ed it has to be presumed that the appointment is valid and therefore all acts of the said Chief Minister is to be viewed in that light. Since this is the stand that I take I cannot see how the plaintiff's argument has helped him in his application. That being so, the Court also cannot see how the plaintiff's allegation made in paragraph 6 of his affidavit that the defendants will carry out acts they are not legally entitled to perform or undertake has been made out.

In making the submission that the Chief Minister or Executive or Government of the day does advise the Yang di-Pertua Negeri as to the convening of the State Assembly, we must not lose sight of the fact that the State Assembly is an entity quite separate from and independent of Government and Sovereign. In Article 13 of the Sabah Constitution the Legislative Assembly of the State, like any of the other States, consists of the Yang di-Pertua Negeri and one House. As to summoning it, Article 21(1) provides the Yang di-Pertua Negeri may from time to time summon the Legislative Assembly. Once summoned the doctrine of separation of powers within the framework of a working democracy operates and to see where the Executive or the Government stands *vis-a-vis* the Assembly it is useful to refer to the judgment of Justice Chang Min Tat, as he then was, in the case of *Fan Yew Teng* v. *Government of Malaysia* above at page 266:

"As to the question whether the Government of Malaysia is wrongly cited as the defendant to these proceedings, the contentions of the plaintiff, put in a nutshell, are that the Government is a necessary party because it is interested in his expulsion and anyone who is interested could be cited as a defendant. The latter contention is plainly untenable. The former, when examined, obviously ignores the doctrine of the separation of powers provided in our Constitution and, however Government as distinct from members of the Legislature may be said to be interested, it also ignores the fact that in the final say, it is the House itself which is concerned with and which alone has the powers to determine the question of its membership. The Plaintiff himself must know this to be the whole truth. To be a member of the House does not necessarily mean that the member is part of the Executive or Government. This is true as much for back-benchers as for members of the Opposition. To contend otherwise is to denigrate from the dignity and standing of the House as one arm of the sovereignty of the nation.

This will be readily appreciated when it is realised that one of the most important of the Speaker's functions is to protect the House against the powers and encroachments of the Executive and to protect minorities within the House itself. As Colonel Clifton Brown said on his re-election as Speaker in 1945, 'As Speaker, I am not the Government's man, nor the Opposition's man. I am the House of Commons' man and, I believe, above all, the back-benchers' man.' And so far as membership of the House is concerned, in the words of W.J. Brown as cited by Martin Lindsay in his booklet on the House of Commons, 'The humblest back-bencher is no less than a member and the greatest Minister is no more than a member, in respect of his Parliamentary rights.'

The high water mark of the independence of the House of Commons from the Executive was reached in the reign of Charles I when Speaker Lenthal resisted the attempt of the Monarch to look for and arrest five members of the House of Commons in these classic words: 'May it please Your Majesty, I have neither eyes to see nor tongue to speak in this place, but as this House doth direct me, whose servant I am.' ...."

In the exercise of my discretion whether to grant or refuse an interlocutory injunction I sought to find if there was anything in the plaintiff's application or submission where the plaintiff has satisfied me that I can grant it. On the contrary I find the authorities point one way that I have no such jurisdiction to grant and more coupled by the merits of the application the plaintiff has not shown me why I should grant it. I, therefore, in the exercise of my discretion refused and dismissed the plaintiff's application against the 1st, 2nd and 3rd defendants. As no order was sought in the prayers in the Summons against the 4th defendant I make no order against him.

Application refused and dismissed.

Solicitors: *Rayner & Co.*

TUN DATU HAJI MUSTAPHA BIN DATU HARUN v. TUN DATUK HAJI MOHAMED ADNAN ROBERT, YANG DI-PERTUA NEGERI SABAH & DATUK JOSEPH PAIRIN KITINGAN

[O.C.J. (Abu Mansor J.) November 4, 1985]

[Kota Kinabalu – Civil Suit No. K467 of 1985]

Constitutional Law – Application for injunction against Chief Minister and Yang di-Pertua Negeri – Allegation that Legislative Assembly is being dissolved – Allegation that Speaker is to be removed – No evidence but mere speculation – Injunction cannot be granted against officers of Government – Government Proceedings Act, 1956, s. 29(2) – Sabah Constitution, arts. 7(1), 10(2), 15(1), 18, 19 & 21(2). – Federal Constitution, art. 72(1).

Practice and Procedure – Injunction – Application for – No statement of claim – Appeal – Erinford injunction – R.H.C. 1980, O.29.

In this case the applicant applied for an interim injunction

(a) to restrain the 2nd defendant by himself or any person acting on his behalf from recommending, advising or requesting the 1st defendant to dissolve the Legislative Assembly of Sabah;

(b) to restrain the 1st defendant from dissolving the Legislative Assembly of Sabah;

(c) to restrain the 1st defendant from removing from office, the Speaker.

Held: (1) there was no evidence that the Legislative Assembly was to be dissolved but only speculation and rumours;

(2) no court may grant an injunction or order an officer of the Government if the effect of granting such an injunction or such an order would be to give any relief against the Government which would not have been obtained against the Government;

(3) the power to dissolve the Assembly can only be exercised in accordance with the provisions of the Constitution and the applicant could not by application to court question the acts or would be acts of the Head of State or the Head of the Government in this aspect;

(4) there was no evidence that the Speaker of the Legislative Assembly would be dismissed but only speculation. The dismissal of the Speaker is by executive act and needs to be confirmed or tacitly agreed to by the Legislative Assembly. The court cannot grant an injunction against the executive act of the Government;

(5) the applicant has not followed the proper procedure in this case as he had made an application for interim injunction without the accompanying Statement of Claim;

(6) leave to appeal would be granted on terms and *Erinford* injunctions granted pending appeal.

[*Editorial Note*: An appeal to the Supreme Court was lodged but was withdrawn on April 28, 1986]

Cases referred to:

(1) *Law Kiat Long & Ors.* v. *Pardons Board & Ors.* [1968] 2 M.L.J. 249, 250.
(2) *Nantha Kumaran* v. *Jaffnese Housing Society Ltd. & Ors.* [1980] 1 M.L.J. 114.
(3) *International General Electric Co. of New York Ltd.* v. *Commissioners of Customs & Excise* [1962] 1 Ch. 784.
(4) *Glasgow Navigation Co.* v. *Iron Ore Co.* [1910] A.C. 293.
(5) *Attorney-General* v. *Scott* [1905] 2 K.B. 160, 169.
(6) *Siow Wong Fatt* v. *Susur Rotan Mining Ltd.* [1967] 2 M.L.J. 118, 120.
(7) *Erinford Properties Ltd.* v. *Cheshire County Council* [1974] 2 All E.R. 448.
(8) *Datuk Hong Kim Sui* v. *Tiu Shi Kian* [1985] 1 M.L.J. 145.

EX PARTE SUMMONS-IN-CHAMBERS.

G. Sri Ram (*Abdul Razak Rouse* with him) for the applicant.

Abu Mansor J.: By their *ex parte* Summons-in-Chambers No. 2 dated October 30, 1985, the applicant prayed for an interim injunction restraining –

(a) the 2nd defendant by himself or any person acting on his behalf from recommending, advising or requesting the 1st defendant to dissolve the Legislative Assembly of Sabah;

(b) the 1st defendant from dissolving the Legislative Assembly of Sabah;

until the trial of this Suit No.K.467 of 1985 or until further order.

And in their *ex parte* Summons-in-Chambers No. 3 dated the October 31, 1985, the applicant applied for an injunction restraining the 1st defendant only from removing from office as Speaker the present incumbent Tan Sri Mohamed Sunoh Marso or appointing as a Speaker anyone other than him until the trial of their action.

The Court heard both Summonses-in-Chambers one after another at the same sitting and at the end of which gave a judgment dismissing both applications for interim injunction.

In support of Summons-in-Chambers No. 2 counsel for the applicant filed in an affidavit (1A) sworn on October 30, 1985 (as evidenced from their copies the original bearing no date). In this affidavit he alleges that his client, the plaintiff, has an interest which would be affected if the 2nd defendant does advise the 1st defendant to have the Sabah State Legislative Assembly dissolved and if the 1st defendant does indeed proceed to have it dissolved. His client is at present seeking under this suit the Court's determination who is the Chief Minister of the State of Sabah and he is alleged to have been involved in conspiracy, duress, *etc.*, and he is also questioning his dismissal by the 1st defendant. In the event that the State Assembly is in fact dissolved there is therefore nothing more to try and the issues raised by his client would become academic and he prayed that the *status quo* should be preserved.

To prove that the 2nd defendant and 1st defandant were in fact contemplating such a dissolution the applicant exhibited "AAR-6", "AAR-7(a)" and "AAR-7(b)", all newspaper articles in Sabah dailies speculating that the Assembly would be dissolved but in "AAR-7(a)" however the 2nd defendant has duly dismissed the news as mere rumours.

Dissolution of the State Assembly if it were to be could only be done by virtue of Article 7(1) and Article 21(2) read with Article 10(2) of the Sabah Constitution. The 1st defendant may dissolve the State Assembly if the leader of the ruling party no longer enjoys the confidence of the majority of the members of the Assembly. What is not disputed is the ruling party has a comfortable majority and the leader of the ruling party has denied there is going to be any dissolution and the Court therefore was more prone to hold there is no good reason as to why the 2nd defendant would want to advise dissolution. It was suggested that the 2nd defendant would advise dissolution to avoid giving evidence in Court at the trial of this suit fixed for the November 18, 1985. It is therefore intended, they say, to frustrate the applicant's claim. On the evidence produced by the application the Court held that there is no evidence whatsoever and too speculative that the 2nd defendant would want to advise the 1st defendant to have the Assembly dissolved let alone to have the State Assembly dissolved in order to defeat the applicant in his claim in this suit.

Then dissolution if it is to be had if not under Article 7 of the State Constitution is only to be had under Article 21(2) thereof. The Court had already held that at the time of the hearing of the application for this interim injunction there is complete absence of evidence (but mere speculation) that the 2nd defendant would advise dissolution. Even if the 2nd defendant had it in his mind then it must be done under Article 21(2) but for what reason and the 1st defendant will still have a discretion to dissolve or otherwise under Article 10(2). Presuming the 2nd defendant does advise and the 1st defendant proceeded to act on that advice can the Court grant an injunction in the circumstances? When the 2nd defendant tenders his advice it is clear to this Court that he would be exercising an executive act as Chief Minister or a Minister acting under the general authority of the State Cabinet. In the Court's humble view the application of the applicant in substance is really questioning the acts or would-be acts of the 2nd defendant as head of a State Government and against the 1st defendant in respect of his powers under the Constitution vis-a-vis that Government. Under section 29(2) of the Government Proceedings Ordinance, 1956, no Court shall grant an injunction or make any order against an officer of the Government (which includes a Minister) if the effect of granting such an injunction or such an order would be to give any relief against the government which would not have been obtained against the Government. The Court felt it would be infringing the spirit of this section if it granted the injunction prayed for. (See *Law Kiat Long & Ors.* v. *Pardons Board & Ors.*[1] and *Nanthakumaran* v. *Jaffnese Housing Society Ltd. & Ors.*).[2] In the case of *International General Electric Co. of New York Ltd.* v. *Commissioners of Customs & Excise*[3] it was held in proceeding against the Crown it was not possible to obtain an interim injunction or an interim declaration which did not determine the rights of the parties but which was only intended to preserve the *status quo*.

As regards the injunction sought against the 1st defendant the Court similarly found that the applicant had failed to make out that there was a definite move to dissolve the State Assembly and likewise it held that the move was only rumours which had been duly denied.

Apart from the uncertainty of the event taking place for reason given in the application against the 2nd defendant even if advice is tendered to the 1st defendant to have the State Assembly dissolved other than under Article 7 of the State Constitution the 1st defendant is vested with a discretion to order dissolution or not under Article 21(2) read with Article 10(2) thereof. Where the Constitution itself had invested the 1st defendant with that discretion the Court held that it was extremely improper that it should interfere by means of an injunction. Such an injunction would certainly run counter to the spirit of Article 21(2) and read with Article 10(2) thereof. For this reason the Court held that it had no jurisdiction to grant an injunction in the circumstances asked for that would interfere with the 1st defendant's exercise of his discretion.

For the above reason the Court held in this Summons-in-Chambers No.2 the applicant failed in his application for an injunction against the 1st defendant. In respect of Summons-in-Chambers No.3 the Court also declined to grant an interim injunction on the ground that the Court was not satisfied that the Speaker of the Legislative Assembly would be dismissed. The evidence on which the Court is asked to act is again too vague from newspapers speculation. The decision that the Court is invited to take cognisance of is the decision of a meeting of the State Assembly due to meet on Monday, November 4, 1985, (hearing Thursday, October 31, 1985). Such an event is remote and may or may not take place and it borders even on it being hypothetical when as such no order should be given. (See *Glasgow Navigation*

Co. v. *Iron Ore Co.*[4]). The case of the *Attorney-General* v. *Scott*[5] may also be in point which decided that the Court cannot decide on something which depends on uncertainties or "in the air".

What we are told by the affidavit of Mr. Abdul Razak Rouse was that at the last sitting of the Assembly there was an attempt to disqualify the applicant. It was unsuccessful as the Speaker had given the applicant leave of absence from the Assembly sittings. Then we are referred to "ARR-11" to a newspaper speculation of a bid to sack the Speaker.

Counsel submitted what is being planned he feared was after the removal of the Speaker by the Assembly the Assembly may disqualify his client and when his client is so disqualified he is no longer a member of the House and the charges against his client will be dropped and remain unanswered. He therefore seeks the Court's order for injunction to stop 1st defendant from sacking the Speaker. The Court is being asked to give orders on possibilities not even probabilities.

The Speaker is appointed by the 1st defendant under Article 15(1) of the State Constitution from persons qualified to be nominated. Under Article 18(2) thereof he shall hold office for such period as may be specified in the Instrument of Appointment. The present Speaker's appointment is until March 29, 1986. It would appear that under Article 19 of the State Constitution the Assembly may decide on the question if the Speaker has ceased to be qualified for appointment. It was submitted by counsel for applicant that under the Sabah Interpretation Ordinance the power to appoint will necessarily include the power to dismiss and the dismissal will necessarily be preceded by the process of or step for appointment. The Court holds that although appointment is by Instrument in view of Article 19 it can be safely assumed that such appointment is confirmed or tacitly agreed to by the Assembly or otherwise they will vote to say he has ceased to be qualified. On the other hand it can also be interpreted, so counsel for applicant says, the dismissal of the Speaker if it is to take place it is by executive act, the 1st defendant doing so on advice of the 2nd defendant in his capacity of head of the State Government.

The Court held that if it is an executive act the court is similarly not empowered under section 29(2) of the Government Proceedings Ordinance to grant an interim injunction. (See *International General Electric Co. New York* v. *Commissioners of Customs & Excise, supra*). If, however, the dismissal by the 1st defendant is the carrying out of the will of the Assembly the Court again will not interfere in a matter within the purview of the Assembly to decide. It therefore dismisses the applicant's application for an interim injunction on either ground.

There is one other matter the Court should mention although this was not one of the grounds on which application for interim injunction was denied. An application for an interim injunction under Order 29 of Rules of High Court, 1980, must be accompanied by or be founded on a writ or a Statement of Claim. At times in urgent cases, however, an *ex-parte* injunction may be granted subject to the undertaking of the applicant to file a Statement of Claim. On reflection it must be said that the issues or complaints as contained in the Summons-in-Chambers No.2 and Summons-in-Chambers No.3 may have gone outside of the original pleadings as the reliefs prayed for are not based on facts that are pleaded in the main suit No. K.467 of 1985 since reliefs can only follow when the facts are properly pleaded (*Siow Wong Fatt* v. *Susur Rotan Mining Ltd.*[6]). This accounts for the attempt to amend in the applicant's counsel affidavit (1A) in Summons-in-Chambers No.2. It is merely an attempt to amend the original writ and even if it had been granted by merely adding the prayer for relief alone is far from complying with Order 29, Rules of High Court, 1980, that there should be proper pleading in the form of a Statement of Claim. This being the case, the applicant made an application in this Summons-in-Chambers for interim injunction without the accompanying Statement of Claim. In passing we say applicant had not then followed proper procedure for which reason reliefs asked for should be refused as being outside the pleadings.

The applicant applied to appeal under section 68(2) of the Courts of Judicature Act. Leave was granted subject to certain terms. Counsel also applied for a grant of *"Erinford* type" injunctions in both Summonses-in-Chambers as prayed pending appeal citing *Erinford Properties Ltd.* v. *Cheshire County Council*[7] and also *Datuk Hong Kim Sui* v. *Tiu Shi Kian.*[8] The Court granted the *"Erinford* type" injunction pending appeal as prayed in both Summonses-in-Chambers subject to terms being complied with else both injunctions will automatically vacate themselves.

Solicitors: *Rayner & Co.* *Order accordingly.*